Supreme Court, U.S.
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NO. 94-204

In The Supreme Court of the United States

October Term, 1994

JIMMY C. CHISUM

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JIMMY C. CHISUM
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Date: October 12, 1994

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ISSUES PRESENTED IN REPLY

1. Whether the Petition for Writ of Certiorari was timely filed.

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ON PETITION FOR WRIT OF CERTIORARI TO
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FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jimmy C. Chisum, hereby Replies in Support of his Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 24, 1994.

ARGUMENT

THE PETITION FOR THE WRIT OF CERTIORARI WAS TIMELY

The Respondent argues that the Petition for Writ of Certiorari was not timely, because the Ninth Circuit's January 24, 1994 memorandum disposition merely "revised" it's September 13, 1993 memorandum dispostion. In reaching this conclusion, the Respondent essentially interchanged the term "revised" with the term "withdrawn." The Ninth Circuit's January 24, 1994 Order states, in part (See Appendix to Petititon, Page A-17):

> "The memorandum **disposition** filed September 13, 1993 is **withdrawn**." (emphasis added)

The order clearly shows that the September 13, 1993 judgment was withdrawn and the new judgment on the merits was entered on January 24, 1994. While the decisions in both the September 13, 1993 and the January 24, 1994 affirmed the district Court's grant of summary judgment, each judgment was separate and distinct from the other.

This is clear from examination of both memoranda. The Court in the September 13, 1993 memorandum concluded that the action was time barred. Thus, the decision did not reach the merits of the case as noted by footnote one (1) at the end of the memorandum, which states to wit:

> "Because we hold that summary judgment for the United States was proper on the ground that Chisum's action was time-barred, we do not address the district court's alternative findings on the merits of Chisum's claims." (App., Pg. A-7)

In its January 24, 1994 memorandum, the Court decided the case on its merits and did not reach the case on the basis that the action was time-barred as noted by footnote one (1) at the end of the memorandum, which states to wit:

> "Because we hold that summary judgment for the United States was proper on the merits of Chisum's claims, we do not address the district court's alternative finding that Chisum's action was time-barred. (App., Pg. A-3)

The footnotes in each case clearly show that the judgments are distinct. Taking the totality of the entire record in the Ninth Circuit, it is clear that the September 13, 1993 judgment was superceded by the January 24, 1994. It was not merely revised but substantially altered the rights of the parties.

The Respondent's reliance on *FCC v. League of Women Voters*, 468 US 364 (1984) and *FTC v. Minneaplis-Honeywell Regulator Co.*, 344 US 206 (1952) is misplaced. Both are distinguishable from this case and tend support the Petitioner.

First, *FCC*, involved the timeliness of an appeal where the appeal was taken from an amendment to the judgment involving an award of attorney's fees. This Court merely recognised that an awared of attorneys fees '"is uniquely separable from the cause of action" that is settled by a court's judgment on the merits, and therfore a postjudgment request for attorney's fees' and thus would not suspend the time for bringing an appeal. (quotes in original). Id. at 287-88. n.10.

This Court in *FTC*, supra, held the FTC's petition for Writ of Certiorari was untimely, because FTC filed a memorandum with the appellate court for affirmance and enforcement of the uncontested parts I and II of the FTC's cease and desist order after the time for petitioning for rehearing from the original judgment had expired, where the "Final Decree" entered by the Appellate Court merely repeated the previous judgment. This Court declined to accept the FTC's memoranudm as a petition for rehearing or a motion to amend a previous judgment.

The January 24, 1994 judgment by the Ninth Circuit substantially changed its previous judgment of September 13, 1993. Had the Respondent continued from its quote of *FTC*, supra, at 211, it would have supported the conclusion that the Petition in the instant case was timely. This Court in *FTC*, supra went on to state that:

> "Only when the lower court changes matters of substance, or resolves a genuin ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, **in its second order, has disturbed or revised legal rights and obligations** which, by its prior judgment, had been plainly and properly settled. (emphasis added)
> Id. 211-12

A Court of Appeals can supercede its judgment. Id. at 211. In determining whether the Petition in this case was timely this Court should consider the following. A Court of Appeals enters judgment affirming a district Court. A timely petition for hearing is filed and denied and then a Petition for Writ of Certiorari is filed and denied. Shortly thereafter, the Court of Appeals *sua sponte* supercedes it judgment with a new judgment but still affirms the judgment of the district Court, on a legal theory in conflict with this Court. Under the Respondent's theory, the party affected by the superceding judgment could not petition for rehearing and could not petition this Court for review because the time for petitioning had expired with the original judgment.[1]

1/ The Petitioner is not aware of a time limit imposed upon a Court of Appeals to *sua sponte* supercede its previous judgment. If such a time limit exists then assume under the circumstances discussed, that the superceding judgment was entered within the imposed time limit.

The Ninth Circuit "disturbed or revised [the] legal rights" of the parties in its January 24, 1994 judgment. *FTC*, supra, at 212. To say otherwise ignores the obvious. Accordingly, the Petitioner was entitled to file his second Petition for Rehearing. It was filed within the time provided by Rule 40(a), Federal Rules of Appellate Procedure, for the January 24, 1994, judgment. Thus, the time for bringing the Petition for Writ of Certiorari was suspended until the Court of Appeals disposed of the Petition for Rehearing, because there was no "judgment" to be reviewed. *Missouri v. Jenkins*, 495 US 33, 46 (1990)[2]

Respectfully submitted this 12th day of October, 1994.

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2/ "A petition for rehearing is designed to bring to the panel's attention points of **law or fact** that it may have overlooked. Fed Rule App Proc 40(a). The panel is required to consider the contentions in the petition for rehearing, if only to reject them." *Jenkins*, supra, at 46 n.14. The Respondent offers no theory on how to bring the overlooked points of law or fact that were raised in the January 24, 1994 memoranudum dispostion. They could not be raised in the first petition for rehearing because the Court's September 13, 1993 judgment did not address the merits of the case.

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